

BOARD OF APPEALS CASE NO. 4653

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BEFORE THE

APPLICANT: Spencer Construction, Inc.

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ZONING HEARING EXAMINER

**REQUEST: On remand for further testimony
to support the denial of the special exception;
3805 Norrisville Road, Jarrettsville**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 11/28/01 & 12/51/01

HEARING DATE: January 30, 2002

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Record: 11/30/01 & 12/7/01

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Spencer Construction, Inc., comes before the Board on remand from the Maryland Court of Special Appeals. The Case has a lengthy history and the Hearing Examiner recites it here in the interest of clarifying the remaining issues before the Board.

The subject parcel is located at 3805 Norrisville Road, Jarrettsville, Maryland 21084. The parcel consists of 6.232± acres and is presently zoned VB, Village Business District.

1980 - Board of Appeals Case No. 2697

The Applicant then and now, Spencer Construction, sought a use variance pursuant to then Harford County Ordinance 20.47, to allow cutting and assembling of wood materials into building components such as roof trusses and staircases used in Spencer's custom home building business. After conducting hearings, the Hearing Examiner recommended approval that the Board ratified, of the Applicant's request subject to four (4) conditions:

1. All building materials either awaiting use on the property or the finished product should be stored inside the building or enclosed by a solid fence, either chain link construction with parcels bolted thereon, or by a stockade type rustic solid fence for security purposes;
2. No signs advertising the building component construction are to be permitted on the premises;

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3. Any addition or enlargement of the use, particularly involving structures, requires Board of Appeals approval; and
4. A variance from the 200 foot required R District for outside storage is hereby granted so that if the storage is contained in the area enclosed on all sides there will be no violation.

1996 - Board of Appeals Case No. 4653

This Applicant, after being cited for violation of the conditions of approval granted in Board of Appeals Case 2697, applied to the Board for the following relief:

1. A modification of the hearing Examiner's decision in Case 2697 to allow the existing use of the property and to allow outside storage of construction materials.
2. A variance pursuant to Section 267-38(C)(5)(a) to allow for a business use in excess of two acres or, in the alternative,
3. A special exception pursuant to Section 267-53(H) of the Code to allow construction services and supplies use in the VB, Village Business District.

After conducting hearings, the Hearing Examiner recommended approval of the variance, which approval was ratified by the Board of Appeals subject to ten (10) conditions of approval.

On appeal, the Circuit Court for Harford County, in an opinion dated May 19, 1998 by Judge Thomas Marshall, remanded the case to the Board of Appeals, to make necessary findings of fact to support the grant of a use variance. Specifically, the Court found that there were no facts stated in the opinion of the Hearing Examiner or the Board to support a finding of uniqueness. On remand and after hearings, the Hearing Examiner issued his January 7, 1999 decision recommending approval once again as to the variance and setting forth findings of fact regarding the uniqueness of the property. The Board of Appeals rejected the recommendation of the Hearing Examiner and denied the Applicant's request in its decision dated May 4, 1999.

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The case was again appealed to the Circuit Court for Harford County and Judge Emory Plitt, in a thirteen page opinion, dated May 18, 2000, affirmed the Board's denial of the Applicant's request as to the variances requested but remanded the case back to the Board for the " limited purpose of making findings of fact and conclusions of law as to the appropriateness of the requested special exception pursuant to Harford County Code".

The case was further appealed to the Maryland Court of Special Appeals which affirmed the decision of the Circuit Court as to the rejection of the Applicant's requests for variances and denied in part the decision of the Board of Appeals which rejected the Applicant's request. It is this decision of the Court of Special Appeals which brings the case once again back to the Board and the Hearing Examiner.

The Court of Special Appeals went to some length to distinguish the law of variances from the law of special exceptions. Further, the Court examined the distinction between use variances and area variances and determined that Spencer was seeking, in this case, a use variance necessitating application of the standards unique to use variances as opposed to area variances. The Court ultimately affirmed the decision of the Circuit Court and the Board of Appeals as to the variances requested by the Applicant. However, the Court also agreed with the Circuit Court that neither the Board nor the Hearing Examiner had made specific findings regarding the request for Special Exception.

The Present Case

The Court of Special Appeals affirmed the decision of the Circuit Court to remand the case to the Board for the limited purpose of determining whether the petitioner's request for a special exception for construction service and suppliers pursuant to Harford County Code Section 267-53(H) is appropriate.

Section 267-4 provides the following definition of construction services and suppliers:

"The performance of work by or furnishing of supplies to members of the building trades, including building contractors; carpentry and wood flooring services; electrical services; energy systems service and products; general contracting; masonry, stonework, tilesetting and plastering services; plumbing, heating and air-conditioning services; roofing and sheet metal services; and septic tanks sales, service and installation."

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Section 267-53(H) of the Harford County Code provides:

“Construction services and suppliers. These uses may be granted in the AG and VB Districts, provided that a buffer yard ten feet wide shall be provided around all outside storage and parking areas when adjacent to a residential lot or visible from a public road.”

In 1980, Spencer Construction, the Applicant herein, constructed roof trusses for use in its custom home building company. At that time, Spencer employed 15 to 16 employees and only 2% of the roof trusses it manufactured were sold to other builders. Since 1980, Spencer’s business has changed substantially. It now employs an average of 35 employees. Five (5) additional buildings have been added to the site. Total building coverage of the site is 17.2% and total impervious surface area is 42% of the site. Thirty percent (30%) of the outside area is used for storage of finished roof trusses which now include steel trusses in addition to wooden trusses. Spencer also sells steel roof supports which were not sold in 1996. Spencer is no longer a custom home builder and substantially all of its business is the manufacture and sale of roof trusses, roof and flooring supports, including the sale of steel supports and trusses. In 1996, there was a school bus operation on the property which has since left. There is a medical office and a pet supply business on the site at the present time. Outside storage of roof material continues to occur in those areas identified in Petitioner’s Exhibit 2 and described by Applicant’s expert (T, Vol. II, page 13. Line 11-14).

While the record is extensive in the case, sufficient time has expired since the original testimony that the Hearing Examiner scheduled a hearing in the matter limited in scope to testimony as to changes that have occurred on the property since 1996 that would or could materially impact on the decision to recommend approval of the special exception. Hearing was held on January 30, 2002 and the Applicant offered testimony regarding changes in uses that have occurred since 1996. In 1996, a bus company operated from the property and it has since vacated the property. The building being used by the bus company is now used by the Applicant’s business for storage and by a pet supply business for warehousing. The Applicant also stated that his business now sells steel roof trusses and other steel material to the building trades from the property. With the exception of the loss of the bus company the intense use of this parcel continues.

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The conditions of Case 2697 have been continuously ignored by the Applicant in that no fence was ever erected to provide screening, a sign continues to be posted on Norrisville Road, buildings and uses were added over the years without permits or further Board approval that received approvals only after violation notices were issued.

During the January 30, 2002 hearing, the Applicant called Mr. Ted Scott as an expert who attempted to introduce a site plan that purported to limit the proposed special exception use to a small, approximately 2 acre, portion of the property (Applicant's Remand Exhibit 1). Applicant's counsel attempted to argue that a business use was being limited to this area and that the storage of raw material and finished product was not part of the special exception use but was" warehousing,, a permitted use within the VB District not subject of this hearing. The Applicant, after objection by People's Counsel attempted to amend the original application in this case to reflect that argument and the Hearing Examiner denied the request. Moreover, after determining those things that had changed on the property, the Hearing Examiner granted People Counsel's motion to end the hearing.

Rejected by the Hearing Examiner was Applicant's notion that the storage of raw materials and finished product was warehousing as opposed to the special exception use of construction services and suppliers. Applicant ignores the fact that the construction and sale of roof trusses is a manufacturing process beginning with raw materials that are cut and assembled into finished product. To separate the storage from the overall manufacturing process is nonsensical and obfuscates the meaning and intent of the Code.

The threshold question in this case is whether this use is, in fact, "construction services and suppliers" as contemplated and defined by the Code. The Hearing Examiner finds that this use is a manufacturing use and does not fall within the Code definition of construction services and suppliers and is thus, not entitled to a special exception use in a VB District. While construction services and suppliers does contemplate uses that are generally associated with the building trades, not every item supplied to the building trades is encompassed within that definition. For example, a factory that builds cranes for use by builders is a manufacturing operation and could not arguably be considered subject to the definition of construction services and suppliers.

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Similarly the manufacture of tools, autos, trucks, prefabricated housing, trailers, etc., are manufacturing operations and are not construction services and suppliers as contemplated by the Code. The definition of construction services and suppliers in fact provides partial guidance as to what the County Council contemplated with this definition. The definition refers to the tradesman themselves, those that actually perform the building trades and not the manufacturers who manufacture the items used in those trades.

Further support for this notion is found in the “Harford County Table of Permitted Uses” wherein the following uses are specifically listed and are not permitted by way of special exception in the VB District (these uses are first permitted in the GI and/or CI Districts):

| | |
|---|-----------------------------|
| Lumber and wood products | Wood kitchen cabinets |
| Wood containers | Wood products |
| Miscellaneous fabricated metal products | Miscellaneous manufacturing |
| Construction and related equipment | |

None of the above uses is permitted in the VB District in any manner including by way of special exception. What the Applicant is doing is manufacturing roof trusses which in some cases, are so large that they cannot be stored inside a building and still allow proper handling. According to the New College Edition of the American Heritage Dictionary (2000 Edition), “manufacture” is defined as follows:

- “1. (a) to make or process (a raw material) into a finished product, especially by means of a large scale industrial operation. (b) to make or process (a product) especially with the use of industrial machines.”

The Hearing Examiner cannot escape the conclusion that this is, in fact, a manufacturing operation. It is true that the finished product is used by builders in the construction process, but that alone is insufficient, in the opinion of the Hearing Examiner, to convert what is clearly an act prohibited in the VB District to one permitted by special exception merely because the finished product is used by builders.

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Additional support for this conclusion is found in the very definition of the Village Business District set forth in Harford County Code at Section 267-38. The relevant portions are included below.¹ The purpose of the VB District is to “provide business services to rural areas and to preserve and enhance the character and function of long established rural settlements. This district compliments the VR (Village Residential) District by providing a mix of business and residential uses at an appropriate scale.” Certainly the scale of this operation falls well without that definition of purpose.

¹ 267-38. VB Village Business District.

- A. Purpose. This district is intended to provide business services to rural areas and to preserve and enhance the character and function of long-established rural settlements. This district compliments the VR District by providing a mix of business and residential uses at an appropriate scale. Where appropriate, the Historic District Overlay Zone may be used to achieve architectural compatibility between old and new buildings.
- B. General regulations. Minimum lot area, area per dwelling or family unit, building setback from adjacent residential lot lines, lot width, front, side and rear yard and maximum building height, as displayed in Table IX, EN shall apply, subject to other requirements of this Part 1.
- C. Specific regulations. The following uses are permitted, subject to the additional requirements below:
 - (5) Use limitations. All business uses in this district shall be subject to the following:
 - (a) The maximum area for any business use shall be not more than two (2) acres, except shopping centers, agricultural services and construction equipment sales and service.
 - (b) The maximum building coverage and impervious surface standards shall be as follows:
 - [1] Maximum building coverage: forty percent (40%) of lot.
 - [2] Maximum impervious surface: eighty-five percent (85%) of lot.
 - (c) Shopping centers, when containing less than six (6) business uses and a gross area of less than fifteen thousand (15,000) square feet. Any shopping center shall be reviewed by the Historic District Commission to determine architectural compatibility in scale, massing, surface treatment and details with the existing village architecture.
 - (d) Enclosed building. All uses permitted shall be conducted within an enclosed building, except parking, loading, unloading, incidental storage and display, or as otherwise permitted.
 - (e) Storage restriction. Outside storage of material or equipment shall be permitted, provided that such storage does not cover more than thirty-five percent (35%) of the lot area and shall not be within the required front yard.
 - (f) Screening requirements. Outside storage shall be screened from any public road or any adjacent residential lot. Such screening shall consist of landscaping, walls or solid fencing of a height of at least six (6) feet and shall be continuous to prevent visibility of stored material or equipment.

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The Code goes on to describe some of the things contemplated as compatible in this zone and include agriculture, accessory dwellings, motor vehicle service station and repair shop. The VB requirements go on to note that any use allowed in the VB District shall be on parcels not exceeding 2 acres except shopping centers, agricultural services and construction equipment sales and service. This request fails to meet this requirement as the parcel exceeds 6 acres in size (although the Hearing Examiner here notes the Applicant's unique argument that only the manufacturing operation and not the storage of raw materials and finished product is within the special exception use - an argument rejected by the Examiner). All uses permitted must be inside an enclosed building except parking, loading, unloading, incidental storage and display or as otherwise permitted. The storage in this case can hardly be characterized as incidental or merely for display purposes. Storage is, however, permitted outside if screening is provided. The Code specifically provides for screening consisting of landscaping, walls, solid fencing and such screening shall be continuous to prevent visibility of stored material or equipment. There is no screening provided by this Applicant and during the January 30, 2002 hearing the Applicant indicated that complete screening of the materials stored outside was not contemplated. In fact, this Applicant has been operating under conditions of approval for a use variance granted in 1980 that require such screening and he has continuously ignored those requirements for 22 years. The Hearing Examiner is convinced that this Applicant does not have nor has he ever had any intention of complying with the conditions of approval imposed by the Board of Appeals in Case No. 2697.

A special exception or conditional use involves a use that is permitted, once certain statutory criteria have been satisfied. It is a desirable use, which is attended with detrimental effects which require that certain conditions be met, and once met, it is a permitted use because the legislative body has made that policy decision. Mossburg v. Montgomery County, 107 Md. App. 1, 66 A.2d 1253 (1995). In this case, the Applicant has failed to meet the first threshold, specifically, whether the use contemplated is allowed by special exception and the Hearing Examiner finds that the use does not fall within the definition of construction services and suppliers and is, thus, not a permitted use in a VB District nor is it entitled to special exception use in the VB District. The use is a manufacturing operation of rather large and intense proportion.

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Even if that were not the case and by some extraordinary stretch of the imagination this use were to be considered within the definition of construction services and suppliers, the special exception would still require rejection because the use cannot meet the remaining statutory requirements of uses permitted in the VB District. The lot size is three times bigger than the maximum lot size allowed in the VB District and the Applicant's use is sprawled across the entire exterior of this parcel. There is no screening provided and the Applicant has ignored for 22 years a requirement to provide fencing which screens his use from view choosing instead to maintain a continuum of litigation to avoid the enforcement action which would most certainly result.

While the Hearing Examiner concludes that this use is not one which is permitted by way of special exception within the VB District because it is a manufacturing operation and not a construction services and suppliers use and because it fails to meet the remaining requirements of a permitted use in the VB District, the Court of Special Appeals specifically ordered the Board and thus the Hearing Examiner to examine the request in light of Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) wherein the Court said:

"The standard to be applied in reviewing a request for special exception use was set forth by the Maryland Court of Appeals in "...The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any facts or circumstances negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide.

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But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. (Citations omitted). These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.” (Emphasis in original).

The Court went on to establish the following guidelines with respect to the nature and degree of adverse effect which would justify denial of the special exception:

“Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” 291 Md. At 15, 432 A.2d at 1327.

This use is an intense manufacturing use located within a rural zoning district. This use violates the specific purposes and general requirements of the VB District as set forth in the Code. The use sprawls across six acres, triple the maximum lot size allowed in the VB District. There was substantial testimony from neighboring property owners that the uses on the property were intense, that there was a substantial amount of noise generated from the parcel that was disturbing at times, that there were substantial drainage and flooding issues existing on site (interestingly, at the January 30, 2002 hearing, the site plan identified as “Applicant’s Remand Exhibit I”, included creation of a storm water management facility to the rear of the property which supports the contention of neighbors that run off, drainage and flooding were real problems on this parcel); there was testimony as to inadequate sanitary facilities including lack of bathroom facilities for the employees of both the Applicant and other employers on the property. There was evidence presented, un rebutted by the Applicant, of uncontrolled rodent infestation on the property. There are a substantial number of employees associated with the various employers utilizing the site. The Applicant testified that his operations and those of the pet supply business make use of large tractor trailer rigs for deliveries to and from the site. There is 35% of the parcel presently used for the outside storage of raw and finished materials, all of which is wholly unscreened from the view of residential properties, public roads, passersby and

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neighboring business uses. This use at this location has produced impacts well beyond those normally associated with construction services and suppliers regardless of their location within the VB zone.

The Department of Planning and Zoning, through its representative, Mr. Anthony McClune, stated when asked whether this use would have more of an impact at this particular location than if it were located somewhere else, stated:

“I believe it would. The site is six acres in size. As previously stated, the Village Business District allows businesses with no more than two acres. Given the existing operation and the other businesses located on the site, I believe it is out of character with what is intended in the Village Business District and would have more of an impact on this area.”


When asked about uses contemplated in the VB District, McClune stated:

“Well, the Village Business District allows for small commercial uses. The intent, when the district was first formed was to allow for businesses that service the village area; those services both retail and service oriented that would supply the residents in the immediate area.”

The evidence presented by the Applicant as to the nature of the particular uses on this particular property coupled with the testimony of the Department of Planning and Zoning and the protesting neighbors lead to the conclusion that this particular use (whether it is characterized as construction services and suppliers or not) at this particular location will have and does have adverse effects above and beyond those inherently associated with a construction services and suppliers use irrespective of its location within the VB zone.

Based on all of the evidence, the extensive record developed in this case, the guidance of the Maryland Courts that have addressed cases involving special exception uses, the provisions of the Harford County Code, and the specific findings of fact set forth herein, the Hearing Examiner recommends that the request for special exception be denied.

Date FEBRUARY 5, 2002



William F. Casey
Zoning Hearing Examiner